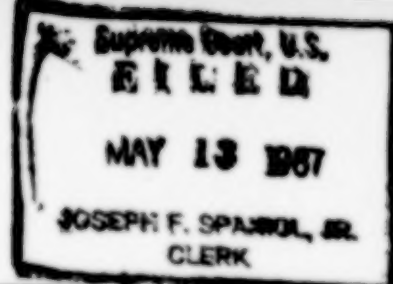


Nos. 86-939, 86-941



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

DONALD P. HODEL,  
SECRETARY OF THE INTERIOR, ET AL.,

*Petitioners,*

v.

STATE OF MISSOURI, ET AL.,

*Respondents.*

ETSI PIPELINE PROJECT,

*Petitioner,*

v.

STATE OF MISSOURI, ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF MONTANA,  
NORTH DAKOTA, SOUTH DAKOTA AND WYOMING  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**BRIEF FOR THE STATES OF MONTANA,  
NORTH DAKOTA, SOUTH DAKOTA AND WYOMING  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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The States of Montana, North Dakota, South Dakota, and Wyoming as *amici curiae* pursuant to Supreme Court Rule 36.4 urge the Court to reverse the judgment of the United States

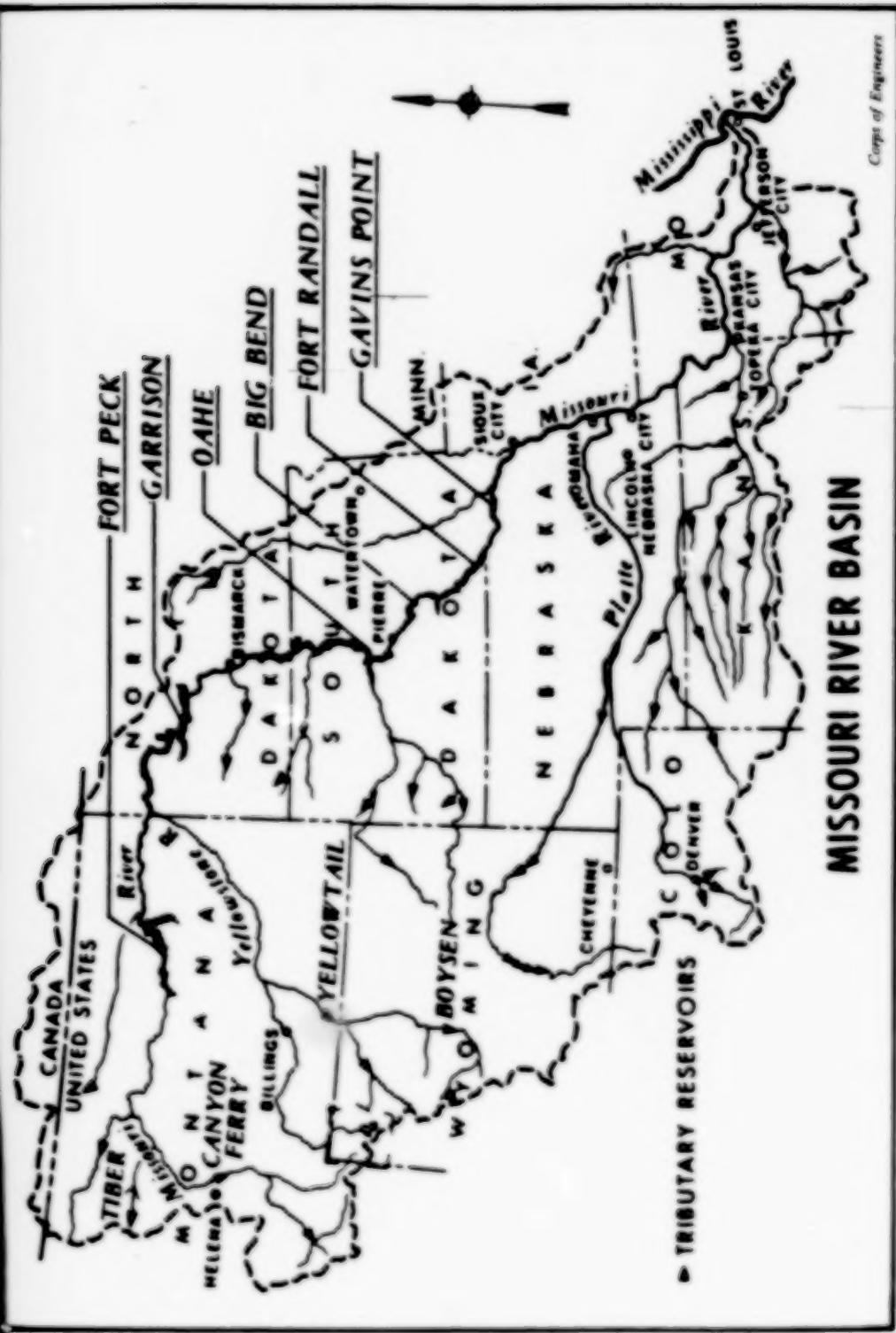


Figure A: Map of Missouri River Basin (reprinted from U.S. Army Corps of Engineers — Missouri River Division, 1986-1987 Annual Operating Plan).

Court of Appeals for the Eighth Circuit in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986) for the reasons set forth herein. This brief is presented to support and supplement the arguments presented by the Solicitor General and ETSI Pipeline Project (formerly Designated Energy Transportation Systems, Inc.), as Petitioners. This Court granted the petitions for certiorari in and consolidated the above-captioned cases on March 2, 1987. On April 9, 1987, the Court extended the time for Petitioners to file their briefs on the merits to and including May 16, 1987. On March 31, 1987, Justice Blackmun granted *amici* leave to file a 50-page brief.

### INTEREST OF AMICI CURIAE

The States of Montana, North Dakota, South Dakota and Wyoming (hereinafter "Upper Basin States") comprise the entire Upper Basin of the mainstem of the Missouri River and its principal tributaries. See Figure A (map of Missouri River Basin). All six mainstem dams on the Missouri River lie within the territorial boundaries of the Upper Basin States. Those dams are:

<u>Name</u>	<u>Gross Storage Capacity<sup>1</sup></u>
1. Fort Peck (in Montana).....	18,909,000 acre-feet
2. Garrison (in North Dakota).....	23,923,000 acre-feet
3. Oahe (in North and South Dakota).....	23,337,000 acre-feet
4. Big Bend (in South Dakota).....	1,874,000 acre-feet
5. Fort Randall (in South Dakota).....	5,574,000 acre-feet
6. Gavins Point (in South Dakota and Nebraska).....	504,000 acre-feet

The dams were constructed under the authority of the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (hereinafter the "Act").

The instant controversy arose when the South Dakota Water Management Board granted a permit for energy industry

<sup>1</sup> See U.S. Army Corps of Engineers, Missouri River Division, 1986-1987 *Annual Operating Plan*, Plate No. 11 (Summary of Engineering Data — Missouri River Main Stem Reservoirs).

use to the South Dakota Conservancy District for the annual consumptive use of 50,000 acre-feet of water stored in Lake Oahe. The South Dakota Conservancy District thereupon assigned the permit to the ETSI Pipeline Project (hereinafter "ETSI"), which intended to use the water for processing coal for transportation in a slurry pipeline from Wyoming to the Gulf Coast States. ETSI then obtained a Water Service Contract from the Bureau of Reclamation ("Bureau") to compensate the Bureau for the service of providing storage of water allocated to reclamation projects not yet constructed.<sup>2</sup> The Bureau provides this reclamation storage in Lake Oahe for the benefit of Upper Basin States and has authority under the reclamation laws to make such storage available for municipal and industrial use.<sup>3</sup> ETSI also obtained a permit from the United States Army Corps of Engineers ("Corps") to construct a pumping station for removal of water from Lake Oahe and a right-of-way from the Corps for a pipeline across federal land adjacent to Oahe.

The States of Iowa, Missouri, and Nebraska (hereinafter "Lower Basin States"). Respondents herein, commenced this lawsuit in federal district court in Nebraska to block ETSI's diversion of water from Lake Oahe. The ostensible purpose of the suit was to challenge the authority of federal officials to execute certain contracts regarding Lake Oahe water. But the real issues transcend the question of bureaucratic authority and involve fundamental questions of priority between downstream navigation uses and upstream beneficial consumptive uses of mainstream Missouri River water and the sovereign right, power and authority of the Upper Basin States over the waters

<sup>2</sup> The Bureau of Reclamation does not own water, allocate water rights or sell water; it merely performs the service of storing water. See 90 Cong. Rec. 8485 (Sen. O'Mahoney), 8551 (Sens. O'Mahoney and Burton), 9279 (amendments nos. 11 and 13) (1944).

<sup>3</sup> Reclamation Project Act of 1939, § 9(c), 53 Stat. 1187, 1194-95 (codified at 43 U.S.C. § 485h(c)).

of the Missouri River stored for reclamation purposes behind the mainstem dams located in the Upper Basin States.<sup>4</sup>

The Eighth Circuit's ruling in favor of the Lower Basin States in *Missouri v. Andrews* threatens to place the entire storage capacity of mainstem dams on the Missouri River under the effective control of the Corps of Engineers, deprive the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus substantially limit the Upper Basin States' right, power and authority to allocate the use of waters wholly within their territorial boundaries. It also upsets the balance Congress struck in the Missouri Basin between state and federal authority over the river and between Upper Basin and Lower Basin States over its use. The United States has recognized the error in the lower court's division of authority between the Corps and Bureau and, as Petitioner herein, is aggressively seeking to correct that error. Because of the guileful drafting of Respondents' Complaint, Montana, North Dakota and South Dakota appear before this Court not as parties but as *amici curiae* only. These States, as well as Wyoming, have more at stake than either Petitioner, because the ruling below deprives them of their sovereign power over their most precious natural resource, their water.

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<sup>4</sup> Recognizing that the dispute presented a controversy between states, South Dakota filed an original action in this Court. See *South Dakota v. Nebraska*, et al., No. 103 Orig. North Dakota intervened in that action and Wyoming joined as an *amicus*. A "Renewed Motion For Leave To File Complaint" is pending, awaiting the outcome of this case.

## SUMMARY OF ARGUMENT

The Flood Control Act of 1944 was a congressional plan for the development of the Upper Missouri River Basin that resolved the conflicting interests of the Upper Basin States of Montana, North and South Dakota and Wyoming and the Lower Basin States of Missouri, Iowa and Nebraska, Respondents herein, as follows:

The Lower Basin States received much needed flood protection and obtained the prospect of some additional water for navigation through the construction of five new high dams in North and South Dakota. The Upper Basin States demanded and received a statutory guarantee that use of stored water for downstream navigation purposes would be subordinate to the use of the water for beneficial consumptive use in the Upper Basin States for such state-validated purposes as domestic, municipal, stock water, irrigation, mining and industrial use.

To implement this priority for upstream consumptive use over downstream navigation use and to assure that allocation of consumptive use of the waters arising in the Upper Basin States would continue to be the prerogative of those States, Congress applied the Reclamation Act of 1902, as amended and supplemented, to a portion of the water in storage, thereby invoking Section 8 of the 1902 Reclamation Act and Section 9(c) of the 1939 Reclamation Project Act. Section 8 requires the Secretary of Interior to conform to state law in managing reclamation water, and Section 9(c) authorizes the Secretary to enter into water supply contracts for various uses.

When Congress thus resolved the interstate conflict over the use of the stored water and the federal-state conflict over the law that would govern the use of the stored water, it simultaneously and ineluctably resolved the issue of the authority of the Bureau of Reclamation and the Corps of Engineers over the stored water. Storage committed to Corps functions of flood control and navigation fell under the authority of that

agency; storage committed to Bureau functions of supplying water for consumptive use in accordance with state law fell under the authority of that agency.

Hence, the ETSI contract in issue in this case is valid and enforceable because the State of South Dakota, in exercising its sovereign authority, authorized the consumptive use provided for in the contract and because the Bureau agreed to a water supply contract from reclamation storage in Lake Oahe pursuant to its authority under Section 9(c) of the Flood Control Act of 1944 and Section 9(c) of the Reclamation Project Act of 1939.

## ARGUMENT

### I.

#### **THE ACT GRANTS PRIORITY TO UPSTREAM BENEFICIAL CONSUMPTIVE USE OVER DOWNSTREAM NAVIGATION USE OF MISSOURI RIVER WATER; GIVES AUTHORITY TO THE BUREAU TO STORE WATER AND DELIVER IT ACCORDING TO THE RECLAMATION LAWS; AND CONFIRMS THE SOVEREIGN POWER OF THE UPPER BASIN STATES TO ALLOCATE SUCH WATER.**

In authorizing the Missouri River Basin Project in the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, Congress had to consider and resolve two fundamental issues: (1) the priority between Upper Basin consumptive uses of water and Lower Basin navigation uses, and (2) the division of authority over Missouri mainstem water as between the Upper Basin States and the federal government. Resolution of those two issues dictated the answer to the subsidiary question of the division of authority between the Corps and the Bureau over the river.



The issues before this Court are the same as those that were before Congress in 1944, and the Court should follow Congress' lead in deciding them. The Court cannot determine the congressional allocation of bureaucratic authority over the water in Lake Oahe without first taking account of Congress' resolution of the Upper Basin-Lower Basin conflict and the federal-state conflict. Once this Court understands how Congress resolved those two conflicts, the congressional allocation of power between the Corps and the Bureau will become clear and the authority of the Bureau and the States undeniable. *Amici* believe that Congress expressed its intention in the Act unmistakably, but if doubt remains, the legislative history makes congressional intention plain.

As to interstate conflict over the use of the water impounded in the Upper Basin reservoirs, Congress decreed a priority for beneficial consumptive use in the Upper Basin States over release of the water for navigation use downstream. As to federal-state conflict over control of the impounded water, Congress made a functional allocation of government authority. For storage space needed for flood control and for water available for navigation, Congress reserved authority to the federal government; for water necessary for beneficial consumptive use in the Upper Basin, it confirmed the traditional authority of the states. To effectuate this allocation of authority, it delegated to the Corps authority to prescribe regulations on storage for flood control and release of water for navigation purposes. To provide water for consumptive use, it directed the Secretary of the Interior to proceed in accordance with the Reclamation Laws. This mandate to the Secretary preserved the tradition of federal deference to state control of water resources stretching back to the Mining Act of 1866, 14 Stat. 251, 253, the Act of July 9, 1870, 16 Stat. 218, and the Desert Land Act of 1877, 19 Stat. 377. Such deference was expressly formalized in Section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390 (codified at 43 U.S.C. §§ 372 and 383),



which directs the Secretary to conform to state law in managing reclamation water. See *California v. United States*, 438 U.S. 645 (1978).

The allocation of authority to the Bureau and the Corps followed from the allocation of governmental authority to the state and federal governments, not the other way around. Congress made two critical decisions on the authority of the Upper Basin States over the stored water: that the Missouri Basin Project would not deprive those States of water for future development and that those States would continue to have the right, power and authority to determine how such development should proceed. To implement those basic decisions, Congress placed the reclamation component of the project under the Reclamation Laws. The flood control and navigation components were federal functions and were therefore put under the jurisdiction of the Corps.

A little history will help the Court understand the setting in which Congress considered and decided both the interstate and federal-state conflicts in 1944. For 120 years the Corps had been engaged in Civil Works programs on navigable waterways. These works were constructed in the humid parts of the country, mostly in the East and the Midwest, partly because those areas developed first and partly because they were wet enough to support commercial transportation by water.<sup>5</sup> In 1902, Congress established the Bureau of Reclamation to support development of the arid West, which needed irrigation to support agriculture and which could not use Corps' projects since it lacked commercially navigable rivers. Thus by 1944, two major public works programs existed literally side by side — in the East and Midwest, the Corps' Civil Works projects and in the West, the Bureau's reclamation projects, available to 17 western states specifically designated as reclamation states in

<sup>5</sup> The Corps also operated along the humid Pacific Coast, where some of the rivers were navigable, notably the Columbia River. Those projects were not interstate, however.

the Reclamation Act of 1902, 32 Stat. 388, as amended and supplemented. In considering the 1944 Flood Control Act, Congress for the first time had to face a public works project on a river that crossed through four reclamation states before reaching the Midwest, where the stream became commercially navigable at Sioux City, Iowa. The proposed new project was to span two distinct cultures: the arid West, where the limited water supply was used primarily for agriculture and was administered under a complex body of state laws directed to problems of shortage, and the humid Midwest, where water in streams was used almost exclusively for navigation and where flood damage was a serious problem.

A major component of the Flood Control Act was the commonplace authorization in Section 10 of a large number of Corps' Civil Works projects — about 90 in all, ranging in cost from \$20,000 to \$200,000,000 (on the Mississippi River). 58 Stat. 887, 891-903 (1944). But superimposed on this traditional legislation concerning Corps projects was the authorization of the Pick-Sloan Plan for development of the Missouri River Basin to reclaim arid lands and to regulate the river to control floods and improve navigation.<sup>6</sup> With one anomalous exception this was the first joint effort between the Corps and the Bureau to develop a river basin.<sup>7</sup> In contrast to the 11 pages

<sup>6</sup> The legislative provisions addressing the Missouri River Basin in the Flood Control Act are best understood as an act within an act. The general provisions of the Act related to a national program of flood control and navigation; the regional provisions addressed the interstate and federal-state conflicts peculiar to the Missouri Basin. Sections 1 and 9 of the Flood Control Act apply specifically to the Missouri Basin. Sections 6 and 8 apply only tangentially to the Missouri. Section 6 is a provision of general application authorizing the Corps to dispose of some of the flood water impounded in the dams it constructed. Section 8 is a forward-looking provision, see 58 Stat. at 891 ("Hereafter . . ."). It allows the Corps to make future recommendations that the Bureau undertake irrigation projects at Corps-operated dams. Section 8 thus has no effect on the allocation of storage space under the Pick-Sloan Plan and of the corresponding allocation of agency authority adopted concurrently by Congress in Section 9 of the same Act.

<sup>7</sup> Between 1940 and 1945, the Corps and the Bureau had an active rivalry over the development of the Kings River in the southern part of the Central Valley of California. The Corps viewed the river as an apt subject for

in the Act devoted to projects exclusively belonging to the Corps, the Pick-Sloan Plan for the Missouri was adopted by the single sentence in Section 9(a) approving the Corps' plans in House of Representatives Document No. 475 (Pick Report) and the Bureau's plans in Senate Document No. 191 (Sloan Report) as revised and coordinated by Senate Document No. 247, 78th Cong., 2d Sess. (1944). Section 9(a) went on to state that "the initial stages recommended [in S. Doc. 247] are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior . . ." 58 Stat. 887, 891 (1944). The other provisions of the Act specifically addressing the peculiar problems of the Missouri River Basin were devoted primarily to adjusting the conflicts that arose over the development of a river that crossed over arid states into humid states, that was used for inconsistent purposes by the West and the Midwest, and that was put under the jurisdiction of two federal agencies with different missions and different legal environments. In a nutshell, legislation authorizing the Corps to construct dams had to deal, for the first time, with vital western water interests.

The first sentence of the preamble to Section 1 acknowledges these western water interests: "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of

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traditional flood control; the Bureau wanted to integrate the river into a comprehensive plan for irrigation of the entire Central Valley. Also involved in the contest were local California interests who hoped to get cheaper water free of the 160-acre limitation of Section 5 of the 1902 Reclamation Act. Although the Kings River controversy was in progress when Congress considered the 1944 Flood Control Act, the problems on that river were quite different from those on the Missouri. There was no interstate conflict over navigation use versus consumptive use, and local interests supported Corps' control because of the opportunity to reduce repayment obligations and avoid acreage restrictions. The whole story is told in Chapter Five of Arthur Maass' classic study, *Muddy Waters, The Army Engineers and the Nation's Rivers* (1951).

the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 33 U.S.C. § 701-1 (codifying 58 Stat. 887, 887-88 (1944)). This explicit recognition by Congress of states' rights in the water resource is unique in a Corps authorization act so far as our research has revealed. No prior Rivers and Harbors Act or Flood Control Act had comparable language. In ordinary Corps Civil Works legislation, such a provision was unnecessary to protect the interests of eastern and midwestern states, which had abundant water and little law on water resource management. It was vital to water-short western states, whose economy depended on a state-administered system for allocating the resource.

Section 1(a), dealing with the Corps' project planning, emphasizes the special input the West had in the Act, although the section itself does not apply to the five Pick-Sloan dams authorized in the Act. The section is forward-looking; it requires the Corps to give notice of future project investigations in the reclamation states ("a State lying wholly or in part west of the ninety-eighth meridian") to Interior and to those states and afford both an opportunity to consult on Corps plans and proposals. 58 Stat. at 888 (codified at 33 U.S.C. § 701-1(a)). Any report from the Corps "submitting any such plans or proposals to the Congress shall set out . . . the relationship between the plans for . . . the proposed works and the plans, if any, submitted by the affected [i.e. reclamation] States and by the Secretary of the Interior." *Id.* (Symmetry was achieved in Section 1(c), which required the same of Interior. *See id.* at 889 (codified at 33 U.S.C. § 701-1(c)).

These are not merely rules for a bureaucratic turf game; they are restrictions on the Corps' proposing flood control and navigation projects in the arid West, and they are in the legislation because, for the first time (apart from Fort Peck and the West Coast), the Corps was building major dams in reclamation country. The western states had to protect both

their sovereign interests and the interests of their allied agency, the Bureau of Reclamation. The West took out double insurance: not only did the Corps have to consult with the western governors and the Secretary of the Interior, but the views of those officials on any Corps proposal had to be forwarded to Congress. See 58 Stat. at 888 (codified at 33 U.S.C. § 701-1(a)).

**A. The O'Mahoney-Millikin Amendment of Section 1(b) Protects Local Consumptive Use.**

In giving the reclamation states protection from the Corps' taking over the Missouri River and committing it to the Corps' mission of providing navigation and flood control, Section 1(a) afforded the Upper Basin States procedural safeguards. Section 1(b), known as the O'Mahoney-Millikin Amendment, is of towering importance, because it adds substantive protection for Upper Basin consumptive uses.<sup>8</sup> It reads:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

33 U.S.C. § 701-1(b) (codifying 58 Stat. 887, 889 (1944)).

While not a model of syntactical elegance, the meaning of the O'Mahoney-Millikin Amendment is manifest when the sentence is broken down into its component parts:

(1) In the operation of the dams to be constructed under the Act, including those constructed by the Corps,

<sup>8</sup> See generally M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 91-93 (Univ. of Illinois Press, 1955).

(2) the use of the waters of the Missouri River arising in the Upper Basin States of North and South Dakota, Wyoming and Montana for navigation purposes downstream,

(3) shall be subordinate to the use of such waters in the Upper Basin States for beneficial consumptive use for domestic, municipal, stock water, irrigation, mining and industrial purposes,

(4) whether such beneficial consumptive uses are presently taking place or shall occur in the future.

The Act authorized five new dams on the mainstem of the Missouri River, all of which were located in North and South Dakota, states which are bisected by the 98th meridian. All of the waters to be controlled by these dams, the waters in issue in this case, arise in those two states plus Montana and Wyoming. The Act also changed the primary purpose of the sixth mainstem dam, Fort Peck, which had been built in Montana between 1933-40, from navigation to irrigation. These six mainstem dams did have multiple purposes, and one of them was downstream navigation. Water was to be impounded in the dams, and some of it was to be made available for release in low flow periods to assist navigation downstream. But, under O'Mahoney-Millikin, this release of water from the upstream reservoirs for navigation must not "conflict" with upstream beneficial uses, present or future. "Conflict" can have only one meaning in this context: if downstream navigation uses compete with upstream beneficial consumptive uses, the latter shall be preferred. In the operation of the dams, this means that water shall not be released for navigation downstream if the water is needed for upstream beneficial use.<sup>9</sup> In 1944, such competition was prospective only; O'Mahoney-Millikin safeguarded future

<sup>9</sup> The Upper Basin States acknowledge that the Corps may have a different view of the effect of the O'Mahoney-Millikin Amendment on certain of the waters of the Missouri River.



Upper Basin development by subordinating navigation uses to present and future beneficial consumptive uses.

That Congress has power to make such a subordination is beyond dispute. It did so analogously when it approved the reservation of 7.5 million acre-feet of consumptive use of water to the Upper Colorado River Basin States in consenting to the Colorado River Compact in the Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (1928). It did the same thing in the absence of an interstate compact, when in the same statute it reserved for future use 0.3 million acre-feet for Nevada and 2.8 million acre-feet for Arizona from the main-stream of the Lower Colorado River. *Arizona v. California*, 373 U.S. 546, 565, 583-84 (1963).

In summary, exercising its Commerce Clause powers over navigable waters, Congress in the O'Mahoney-Millikin Amendment made three fundamental decisions:

1. It granted a priority to beneficial consumptive use of Missouri River water in North and South Dakota, Montana and Wyoming over downstream navigation. By establishing this priority of use, Congress allocated the first use of the water to the Upper Basin States and subordinated the Lower Basin States' navigation claims. Congress has this power and it clearly exercised it. In this sense, Congress made an apportionment of the Missouri River in favor of the Upper Basin States.
2. It confirmed the sovereignty of the Upper Basin States over their Missouri River water, because it protected future beneficial consumptive uses. The only sovereign authority and the only legal systems available to determine what those future uses would be resides in the States.
3. It reaffirmed that state-validated consumptive uses of water recognized by western water law would be deemed beneficial, including industrial use.

These three congressional decisions effectively destroy the Respondent States' claims. If the Upper Basin States have control of Missouri River water within their boundaries for the full range of beneficial consumptive uses, in preference to the Lower Basin States' use of that water for navigation, it follows that the Corps of Engineers cannot control that water, except as the Act specifically authorizes the Corps to manage flood control space in the mainstem reservoirs and authorizes releases for navigation purposes that do not conflict with consumptive uses. It also follows that the traditional role of the Bureau of Reclamation in western water development would continue in the reclamation states of the Upper Missouri Basin.<sup>10</sup> This division of authority between the Corps and the Bureau was established by the preamble to Section 1 and by the O'Mahoney-Millikin Amendment and was carried out consistently thereafter in the Act.

#### **B. The Corps and Bureau Share Authority Over the Mainstem Reservoirs.**

The principal delegation of authority to the two Secretaries is found in Section 9, 58 Stat. at 891. As noted earlier, in Section 9(a) Congress approved the Pick-Sloan Plan, authorized the initial stages of the Plan and instructed the two Secretaries to begin prosecution of the Plan. The Pick-Sloan Plan generally defines the water subject to the jurisdiction of each Secretary, and Sections 9(b) and 9(c) specify the authority of each over such water. Section 9(b) authorizes the Corps to construct the works provided for in Section 9(a). Section 9(c) invokes the Reclamation Act of 1902, as amended and supplemented, as the source of Interior's authority over "reclamation and power developments" under the Pick-Sloan Plan. 58 Stat. at 891. Subsidiary grants of power are found in Sections 5 and 7: Section 5 governs the transmission and sale of

<sup>10</sup> As discussed in the next section, the Bureau and the Corps share authority over stored waters, and one area of this shared authority is release of water for the generation of hydro-electric power.



electric power by Interior; Section 7 directs the Secretary of War to prescribe regulations "for the use of storage allocated for flood control or navigation . . . ." 58 Stat. at 890.

It is not possible from reading Section 9(a) or the Pick-Sloan Plan in Senate Document No. 247 to quantify precisely the volumes of water under the control of each Secretary, and it is unnecessary for the Court to consider that question in this case. All the Court need do is confirm the arrangements made in Pick-Sloan and adopted in Section 9(a) of the Act, namely, that the storage capacity of the five new dams was to be divided among several functions, with Interior in control of reclamation and transmission and marketing of hydro-power, with the Corps in control of navigation and flood control and with the two agencies sharing decisions on the use of stored water for generation of electricity. The same arrangement was made for the existing Fort Peck Dam, which when first built was used primarily for flood control and navigation. With the increased downstream flood control and navigation storage capacity resulting from the five new dams, Fort Peck's purpose was changed to operations "primarily in the interest of irrigation." *Pick-Sloan Plan*, S. Doc. No. 247, *supra*, at 2.

Respondent States take great comfort from Section 6 (now codified at 33 U.S.C. § 708), which authorizes the Secretary of the Army to make contracts "for domestic and industrial uses for surplus water . . . ." *Brief For Respondents, The States Of Missouri, Iowa And Nebraska, In Opposition To Petitions For A Writ Of Certiorari*, at 3, 8, 9, 11. They boldly assert that "[t]he 1944 Congress gave Army jurisdiction over Lake Oahe and over industrial use of its waters." *Id.* at 11. Thus, in Respondents' view, Section 6 contradicts all of the other language in the Act that confirmed the Upper Basin States' control over their water resources. Under Respondents' view, the preamble to the Act is meaningless, the O'Mahoney-Millikin Amendment giving priority to consumptive use was never enacted, and the Pick-Sloan Plan was a total victory for the Corps of Engineers — and

the downstream states. Instead of a law that reserved Missouri River waters within the four western reclamation states to those states for allocation according to state law and for reclamation development in cooperation with the Bureau of Reclamation, in Respondents' view Congress turned those waters over to the Corps. Obviously, Congress did no such thing.

What then did Congress intend in Section 6? The key term is "surplus water," and that term is not defined in the Act. However, the concept was not new in legislation authorizing Corps Civil Works projects. The Rivers and Harbors Act of 1888, 25 Stat. 400, 417, granted the Secretary of War authority to license private power generation on a Corps project, "*Provided*, that the leases or licenses shall be limited to the use of the surplus water not required for navigation . . . ." Fourteen years later, in the Rivers and Harbors Act of 1902, a similar licensing authority was granted to the Secretary with an identical proviso limiting the licenses "to the use of the surplus water not required for navigation . . . ." 32 Stat. 331, 358.

Given this background and the structure of the 1944 Act, the term "surplus water" should be construed as water under the jurisdiction of the Corps that becomes, from time to time, surplus to the needs of navigation and flood control. In practicality, these will be flood waters. When the river is full and a flood occurs, there is need to use the empty flood control capacity of the reservoirs and no need to release water for navigation. Those flood waters are surplus to the purposes of the Corps and are subject to the Corps' contracting authority.

It should be recalled that Section 10 of the 1944 Flood Control Act authorizes some 90 projects located elsewhere in the country than in the Missouri Basin, and that many of the provisions of the Act were standard phraseology in Corps' Civil Works legislation. Section 6 applies, of course, to the Section 10 projects as well as to the Missouri Basin projects. Limiting the Corps' Section 6 authority over the Missouri Basin dams to

that portion of the stored water devoted to Corps functions allows Section 6 to operate equally on Section 10 projects and Missouri Basin projects, harmonizes the section with other sections of the Act protecting states' rights in mainstream water and tracks earlier usage of the term "surplus water" in prior Corps legislation. As demonstrated in Section II of this brief, it also comports with the legislative history and the Corps' reservoir operating regulations.<sup>11</sup>

Prior to the Eighth Circuit's ruling, the Corps defined surplus water as that water which is not otherwise "utilized to fill an authorized project purpose." U.S. Army Corps of Engineers Project Purpose Planning Guidance ER-1105-2-20. The only water that is surplus under this interpretation — and thus available for sale under Section 6 of the Act — is spilled water. Water allocated for reclamation, irrigation, or power generation is not surplus, because it is utilized to fill an authorized project purpose. The court of appeals was aware of this problem but did not offer any satisfactory explanation for how the Corps could redefine "surplus" to satisfy all the consumptive uses that

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<sup>11</sup> The Corps allocates the storage space in the six mainstem dams into four categories: 1) exclusive flood control reserve; 2) annual flood control and multiple-use capacity; 3) carry-over multiple-use capacity; and 4) inactive capacity. See Figure B (diagram); U.S. Army Engineer Division, Missouri River Corps of Engineers, *Missouri River Main Stem Reservoir System, Reservoir Regulation Manual: Master Manual*, V-1 to V-2 (1979). 6.3% of the total mainstem storage capacity of the six mainstem dams is allocated to the exclusive flood control category. See U.S. Army Corps of Engineers, Missouri River Division, *1986-1987 Annual Operating Plan*, Plate No. 11 (1986). This space is reserved for "detention of extreme or unpredictable flood flows," *Master Manual*, *supra*, at V-1. An additional 15.7% of the total mainstem storage capacity is reserved for the annual flood control and multiple-use capacity category. See *1986-1987 Plan*, *supra*, at Plate 11. This space is for "normal flood flows" and annual multiple-purpose regulation of the impounded flood waters. *Master Manual*, *supra*, at V-1. The capacity in this zone is evacuated to a predetermined level by March 1 of each year to provide storage space for the flood season. When this flood water is evacuated, it is used for multiple-use purposes to the extent consistent with the principal concern of flood control. *Id.* at V-1 to V-2. This is the water that may properly be viewed as "surplus water" subject to sale by the Corps under Section 6 of the Flood Control Act of 1944, 58 Stat. at 890 (codified at 33 U.S.C. § 708).

# MISSOURI RIVER MAIN STEM RESERVOIRS

## COMBINED STORAGE CONTENTS



Figure B: Diagram of Storage Zones In Missouri River Mainstem Reservoirs.

Congress anticipated in the Upper Basin States. *See* 787 F.2d at 284-85 n.20, ETSI Pet. App. at 29a. The Lower Basin States disingenuously suggest that the Corps can attempt to broaden the definition of surplus water to include all stored flood waters, while simultaneously admitting that Iowa and Missouri have already protested such a modified definition. *See Brief of Respondents in Opposition to Certiorari Petition*, at 8 n.5. Nevertheless, a broader definition of "surplus water" cannot replace the shared administration between the Corps and the Bureau that Congress established in 1944. *See Reply Brief For The Federal Petitioners in Support of Certiorari Petition*, at 3-6.

In summary, the authority granted the two Secretaries is wholly consonant with the overall congressional scheme for development of the Upper Basin of the Missouri River: the Secretary of the Interior has authority over reclamation developments under the Reclamation Act of 1902, subject to Section 8 thereof, thus accomplishing the congressional purpose stated in the preamble of the 1944 Act "to recognize the interests and rights of the States . . . in water utilization and control . . .," 58 Stat. at 888 (codified at 33 U.S.C. § 701-1). Interior's authority

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53.3% of the total mainstem storage is allocated for beneficial consumptive uses, navigation and power production in what the Corps calls the carry-over multiple-use capacity category. *See 1986-1987 Plan, supra*, at Plate 11; *Master Manual, supra*, at V-2. This water is available for consumptive use in accordance with state law and under water supply contracts from the Bureau of Reclamation. The Bureau's authority over this storage does not interfere with the Corps' flood control function, because that function is covered in the first two storage zones discussed above. In fact, consumptive use of stored water cannot interfere with flood control functions, since withdrawal of water from storage makes space available for flood control. The Corps recognizes that "all irrigation and other upstream water uses for beneficial consumptive purposes" must be satisfied each year from this third category, consistent with the O'Mahoney-Millikin preference provision. *See Master Manual, supra*, at III-3 to III-4, IX-1.

The remaining 24.7% of the total mainstem storage capacity is allocated for what the Corps calls "inactive capacity." *See 1986-1987 Plan, supra*, at Plate 11; *Master Manual, supra*, at V-2. The Corps envisions this zone as the "bottom" zone providing sediment storage capacity and a minimum powerhead, as well as a minimum pool for recreation, fish and wildlife. *Master Plan, supra*, at V-2.

over reclamation water, including municipal water supply, also accomplishes the purposes of the O'Mahoney-Millikin Amendment, because beneficial consumptive uses for "domestic, municipal, stock water, irrigation, mining, or industrial purposes," 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)), will be under the ultimate control of the Upper Basin States, again by virtue of the requirement of Section 8 that the Secretary of the Interior conform to state law. Finally, the Corps' authority is limited to water (and storage space) to be devoted to traditional Corps functions, navigation and flood control; any water surplus to those functions could be sold for domestic or industrial use. The various parts of the state-federal accommodation fit together, producing a coherent plan that protects the interests of the states but permits the multi-purpose projects to go forward.

Though Congress faced a novel plan for developing a river basin and chose to delegate authority to implement the plan to two government agencies with very different traditions, temperaments and missions, it harmonized the interests of the arid West and the humid Midwest in an intelligible piece of legislation that accomplished the following central objectives:

1. The midwestern states received flood protection and the prospect of receiving some additional water for navigation; the western reclamation states were guaranteed the right to use their legal systems to administer their water resources and had the prospect of receiving federal aid to develop irrigation projects.

2. The use of water for downstream navigation was subordinated to beneficial consumptive uses for state-validated purposes: domestic, municipal, stock watering, irrigation, mining or industrial uses.

To accomplish these objectives, Congress gave authority to the Corps to build the dams and operate the navigation and flood control components of each project, subject to the limitations set out above, and gave authority to the Secretary of



Interior to operate the reclamation components of each project, subject to the provisions of the 1902 Reclamation Act, a notable feature of which is Section 8, which requires the Secretary to conform to state law.

Neither the objectives nor the means of accomplishing them should be surprising in view of the historical antecedents of the Act, especially the traditional relationship of the federal government to the western states regarding water resources. *See California v. United States*, 438 U.S. 645 (1978). For the first time in history a major multi-purpose project was initiated on a river that ran through reclamation states concerned with agricultural development and also crossed states in the humid Midwest concerned with flood control and navigation, the traditional functions of the Corps. Conflicting claims had to be resolved: traditional state control of water resources in the arid West was in competition with the Corps' suzerainty over rivers in the water-rich Midwest, where navigation and (by 1944) flood control were principal concerns and state control over water resource development was a minor consideration because of the plentitude of water.<sup>12</sup> The compromise that was reached

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<sup>12</sup> Commissioner of Reclamation Harry W. Bashore explained that the clash between Bureau and Corps policies arose because of the climatic differences between the areas where these agencies had traditionally performed their work:

The problem presented by the Missouri River has arisen because of a clash between policies that are not uniformly adjusted to the climatic differences between the humid East and the Midwest and the arid and semiarid West.

The conflict is between the beneficial, consumptive use of water in the drier areas for domestic, irrigation, industrial, and mining purposes, and the use of waters in the humid areas to maintain flowing navigation channels. It arises on many, if not all of those streams which, like the Missouri, arise in the mountains west of the 100th meridian and flow out of arid lands into humid climates where irrigation is not necessary to sustain agriculture.

The decision will have to be made by the Congress as to which use of the water resources will take precedence in the West. This same problem was before some of the Western States. The common law of

is what can be expected in a public works project, particularly in 1944, when the New Deal was only 11 years old and when apprehension of a renewed depression upon demobilization of the armed forces was strong: there was something in it for everybody. The Corps was allowed to build major on-stream structures; space was provided in those structures for reclamation water, and the Bureau was encouraged to develop large-scale plans to bring hundreds of thousands of acres under irrigation. The downstream states received substantial protection from floods and regulation of the stream for improved navigation. The upstream states not only had the prospect of new irrigation projects but received a guarantee that their traditional control over their water resources was preserved.

In only one respect was there a head-on collision: if both upstream beneficial consumptive uses and downstream navigation uses could not be satisfied, upstream beneficial consumptive uses had priority. Whether this was the political price for the project or whether it was thought that the conflict would never come about will never be known, but the Act is clear on the outcome: navigation is subordinate. 58 Stat. at 889 (codified at 33 U.S.C. § 701-1(b)). From that fundamental decision flows the remainder of the Act: the Upper Basin States have sovereign authority over allocating beneficial consumptive use; the Bureau has authority over storage water committed for beneficial consumptive use; the Corps has authority over storage space and water used for flood control and navigation.

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riparian rights which was inapplicable to the conditions of the arid region, was supplanted, in most instances quickly, by the theory of appropriation and beneficial use.

*Flood-Control Plans and New Projects: Hearings on H.R. 4485 Before the House Comm. on Flood Control, 78th Cong., 2d Sess. 958 (1944)* [hereinafter "Flood Control Hearings"]; see also *Hearings on H.R. 3961 Before the House Comm. on Rivers and Harbors, 78th Cong., 2d Sess. 2 (1944)* [hereinafter "Rivers and Harbors Hearings"] (Gov. Moses: it was inevitable that the Corps and Bureau would come into conflict in the Missouri basin in view of their different missions and responsibilities).



## II.

**THE LEGISLATIVE HISTORY CONFIRMS THE  
FOREGOING INTERPRETATION OF THE ACT  
THAT (1) THE BUREAU AND THE CORPS SHARE  
AUTHORITY OVER STORAGE IN THE DAMS, (2)  
BENEFICIAL CONSUMPTIVE USE WAS  
PREFERRED OVER NAVIGATION AND (3)  
STATE CONTROL OF WATER RESOURCES  
WAS MAINTAINED.**

**A. The Pick-Sloan Plan, Adopted by Congress, Reflects Agreement for Shared Authority Over Stored Water Between the Corps and the Bureau.**

The single most important document in the legislative history of the Flood Control Act of 1944 is Senate Document No. 247, 78th Cong., 2d Sess. (1944), known as the Pick-Sloan Plan. Rather than setting forth the details of the mainstem Missouri River dams to be constructed, Section 9(a) of the Act simply incorporated by reference the Pick Report (H.R. Doc. No. 475), the Sloan Report (S. Doc. No. 191) and the Pick-Sloan Plan, which reconciled the differences between the two. See 58 Stat. at 891.

The Pick-Sloan Plan was a compromise agreement between the Pick Report, H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), which the Corps prepared, and the Sloan Report, S. Doc. No. 191, 78th Cong., 2d Sess. (1944), which the Bureau prepared.<sup>13</sup> In six pages, the Plan established a comprehensive

<sup>13</sup> The Pick-Sloan Plan was a shot-gun wedding as well as a compromise; the Corps and the Bureau quickly reached agreement because Congress was threatening to establish a Missouri Valley Authority (along the lines of T.V.A.) that would have divested both the Corps and Bureau of *any* authority over the mainstem reservoirs. See 90 Cong. Rec. 8250-51 (1944) (summary by Sen. Murray), 8374 (Sen. Murray), 8422 (Sen. Murray); see generally M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 88-91, 93-96 (Univ. of Illinois Press, 1955).

The Corps' Pick Report would have established four small mainstem dams near Mobridge, Pierre, Wheeler and Yankton, South Dakota with a

scheme for water storage on the mainstem of the Missouri River and definitively provided that the Corps and the Bureau would share authority over operations of the mainstem dams to be built by the Corps. Pick-Sloan begins by recognizing the following "basic principles":

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combined total storage capacity of 18,200,000 acre-feet, and one large dam near Garrison, North Dakota with 17,000,000 acre-feet of storage. *See Pick Report*, H.R. Doc. No. 475, 78th Cong., 2d Sess. (1944), at 28 (described in *Pick-Sloan Plan*, S. Doc. No. 247, *supra*, at 2). Fort Peck Reservoir would have been converted into a multiple purpose reservoir, emphasizing irrigation. *Pick-Sloan Plan*, S. Doc. No. 247, *supra*, at 2. Otherwise, the Pick Report was primarily concerned with flood control and navigation, except at Garrison Dam in North Dakota, which also had an irrigation component. *See Pick Report*, H.R. Doc. No. 475, *supra*, at 28, 31; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Army plan "dealt primarily with navigation and flood control, with incidental power.").

The Bureau's Sloan Report would have established two small mainstem reservoirs near Wheeler and Joe Creek, South Dakota, with a combined total storage capacity of 5,350,000 acre-feet, one very large mainstem reservoir near Pierre, South Dakota, with storage capacity of 19,600,000 acre-feet, and four tributary reservoirs, with a combined total storage capacity of 6,230,900 acre-feet. *See Sloan Report*, S. Doc. No. 191, 78th Cong., 2d Sess. (1944), at 118 (described in *Pick-Sloan Plan*, S. Doc. No. 247, at 2-3). Fort Peck would have been used primarily for irrigation purposes. *Sloan Report*, S. Doc. No. 191, *supra*, at 115. As would be expected, the Sloan Report was primarily concerned with irrigation uses for Missouri River mainstem water, for the Bureau had long been engaged in comprehensive studies of irrigation in the entire Missouri River Basin. *See, e.g., Sloan Report*, S. Doc. No. 191, *supra*, at 107, 115-17, 123; *see also* 90 Cong. Rec. 8489 (1944) (Sen. O'Mahoney: Bureau plan "dealt primarily with irrigation and reclamation.").

The Pick-Sloan Plan maximized the storage space in the mainstem reservoirs by authorizing both the large dam proposed by the Corps near Garrison, North Dakota (creating what is now Lake Sakakawea) and the large dam proposed by the Bureau near Pierre, South Dakota (creating what is now Lake Oahe). The Pick-Sloan Plan also opted for two of the smaller dams proposed by the Bureau (Fort Randall and Big Bend near Wheeler and Joe Creek, South Dakota) and one of the smaller dams proposed by the Corps (Gavins Point near Yankton, South Dakota). *Pick-Sloan Plan*, S. Doc. No. 247, *supra*, at 3. The only mainstem dam proposed by either the Corps or the Bureau that was not approved in Pick-Sloan was the Oak Creek Dam, which was flooded out by the higher Oahe dam proposed by the Bureau.

The substitution of the Bureau's high dam at Oahe for the two low dams proposed by the Corps is further evidence, if such is needed, of the major reclamation ingredient in Pick-Sloan. There would have been no high dam at Oahe, creating a reservoir of 23.3 million acre-feet (about  $\frac{3}{4}$  the size of Hoover Dam's Lake Mead), except for the reclamation component proposed by the Department of the Interior.

(a) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(b) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(c) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

*Pick-Sloan Plan*, S. Doc. No. 247, *supra*, at 1. The Plan then discussed the capacity and intended purpose of each new mainstem dam and in every instance emphasized that water would be stored for both navigation and irrigation uses as well as for flood control and other uses:

[T]he following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.

. . . . .

[The Garrison Dam will provide] a large volume of useful storage capacity for flood control, navigation, and irrigation . . . .

. . . . .

The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes.

. . . . .

The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering

report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

. . . .

Development of the Missouri River Basin in accordance with House Document No. 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.

*Id.* at 3-5. In short, whenever navigation was mentioned, so was irrigation.

The specification in the joint report of the Bureau and Corps that the dams were to be operated for both irrigation and navigation/flood control purposes amounted to a delineation of the authority of the two agencies. The Bureau was expert at irrigation of which the Corps knew nothing; the Corps was expert at navigation and flood control, of which the Bureau knew little. The compromise would not have occurred if the authority of the two agencies had not been preserved for each to perform its traditional function. Moreover, as to the irrigation component, only the Bureau satisfied the declaration of policy in the Act's preamble, recognizing "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control . . . ." 58 Stat. at 888. The Bureau alone satisfied this policy requirement because it alone operated under the command to conform to state law. *See* Reclamation Act of 1902, § 8, 32 Stat. 388, 390 (codified at 43 U.S.C. §§ 372 and 383).

Other actions of the Corps and the Bureau confirm the agreement to share authority over the stored water. In

commenting on the Bureau's Sloan Report in April 1944, Chief of Engineers, Major General Reybold stated:

It is essential that the main stem reservoirs in North and South Dakota be built, operated, and maintained by the Corps of Engineers as stated in my report and in your letter of December 17, 1943, both printed in House Document 475. Tributary reservoirs should, when advisable from the standpoint of basin-wide development, be constructed, operated, and maintained by the agency with dominant interest under existing law. In *all* reservoirs, utilization of storage for flood control should be in accordance with regulations prescribed by the Secretary of War and utilization of storage for irrigation should be in accordance with regulations prescribed by the Secretary of the Interior.

*Sloan Report*, S. Doc. No. 191, *supra*, at 7-8 (emphasis added); see also *Pick Report*, H.R. Doc. No. 475, *supra*, at 4 ("utilization of storage reserved for irrigation in all multiple-purpose reservoirs should be in accordance with regulations prescribed by the Secretary of the Interior").<sup>14</sup> In the *Pick Report* Major General Reybold explained, "The Corps of Engineers recognizes the broad and important interests and responsibilities of the Bureau of Reclamation in the Missouri River Basin and will continue to plan its work in that basin so as to coordinate fully the activities of both agencies." *Pick Report*, H.R. Doc. No. 475, *supra*, at 3. The *Pick Report* discussed the practical aspects of how such joint administration would work:

In connection with the development of the multiple-purpose projects, those shown for the Missouri River will provide for the maximum practicable storage of water of the main stem. The water to be impounded in these, as

<sup>14</sup> The Corps considered the mainstem Missouri River reservoirs to be multiple purpose reservoirs. The *Pick Report* that Reybold was endorsing presented a plan "which provides for the construction of 12 additional multiple-purpose reservoirs, 5 on the Missouri River with dams located above Sioux City . . . [and 7 on Missouri River tributaries]." *Pick Report*, H.R. Doc. No. 475, *supra*, at 16.



well as the other multiple-purpose structures shown in tables 1 and 2, will be utilized to produce the maximum practicable development of irrigation, navigation, power, and other multiple purposes. However, sufficient storage will be provided in each reservoir to provide for the needs of local flood protection downstream from the reservoir as well as for the needs of the general comprehensive plan for flood control for the Missouri River Basin. To provide for the maximum utilization of the waters stored in multiple-purpose reservoirs, a plan would be worked out for each structure in collaboration with the various water-use agencies involved. The amount of water to be made available to the Bureau of Reclamation for irrigation would be arrived at after close collaboration with that agency.

*Id.* at 30. At the House hearings on the flood control bill, Colonel Reber specifically stated that the Bureau would manage irrigation features at dams built by the Corps:

Mr. Curtis. If the Army constructs any dam that has features in it for irrigation or as a distributing system, its construction and its maintenance and its management for irrigation will be turned over to the Bureau of Reclamation; is that right?

Colonel Reber. That is correct.

*Flood Control Hearings, supra*, at 1073.

The Bureau shared the Corps' view of how the mainstem dams would be cooperatively administered, with the Corps managing the flood control and navigation functions and the Bureau managing the irrigation and reclamation functions. The Bureau of Reclamation's Board of Review stated in the Sloan Report:

The agency with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests. All reservoirs where flood control and navigation are dominant should be



operated by the Corps of Engineers, and where the flood-control and navigation functions are minor, the reservoirs should be operated in accordance with regulations of the Corps so far as flood control and navigation are concerned. *All irrigation features should be operated by the Bureau of Reclamation or its agents.* All reservoirs in which irrigation, restoration of surface and ground waters, or power, is dominant, should be operated by the Bureau of Reclamation. *Where these functions are minor, the reservoirs should be operated under regulations of the Bureau of Reclamation so far as such functions are concerned.* In like manner, agencies with jurisdiction over other functions should be recognized.

*Sloan Report*, S. Doc. No. 191, *supra*, at 11 (emphasis added).

Congressional debates reveal that Congress understood that the two agencies would share authority. In the course of the debates the particular issue of "surplus water" in Section 6 was clarified. Members of Congress debating the Flood Control Act specifically relied on the assurances of the Corps and Bureau in the Pick and Sloan Reports and elsewhere that the Bureau would control storage allocated to reclamation in Corps' constructed reservoirs. See 90 Cong. Rec. 4141 (1944) (Rep. Case). When discussing the reference in what ultimately became Section 6 of the Act to "surplus water" that would be subject to disposal by the Corps, the members of Congress understood that surplus water referred only to water stored for purposes within the Corps' traditional domain, flood control and navigation, and would not include reclamation water. See 90 Cong. Rec. 4133 (1944) (comments of Rep. Curtis concerning Section 4 [eventually renumbered as Section 6, 90 Cong. Rec. 8546 (1944)]: "It would be my opinion that water appropriated for irrigation is not surplus water."); see also *Flood Control Hearings*, *supra*, at 559 (testimony of Clifford Stone: surplus water is water impounded by the Corps in a flood that would otherwise be quickly released to maintain future flood storage space). All storage allocated to reclamation was to be regulated by the Bureau of Reclamation under

the federal reclamation laws. 90 Cong. Rec. 4143 (1944) (Rep. Case); *see also id.* at 4125 (colloquy between Reps. Chenoweth and Whittington). Representative Curtis of Nebraska noted that the words of then Section 4 on surplus water were not the "choicest" and asked the following question of Representative Whittington, the chairman of the House Flood Control Committee:

May I ask the chairman of the committee if he will not agree with me in this statement in order that we might show legislative intent, that it was not our intention to include the sale of water for irrigation purposes under section 4, that that dealt with other uses of water?

[Rep. Whittington] Absolutely . . . .

90 Cong. Rec. 4134 (1944). Representative Whittington then added so "there should not be any uncertainty" that:

I think there need not be any fear that the intent of the committee as well as the language of the bill would not make it [then section 4] applicable to irrigation. If it were, irrigation would be disposed of by the Secretary of the Interior.

*Id.*; *see also* 90 Cong. Rec. 4197 (1944) (Representative Whittington: "as I stated yesterday, the purpose of section 4 in no way involves reclamation."); *see also id.* at 4202 (colloquy between Reps. Curtis and Whittington).

It should be noted that the terms "irrigation" and "reclamation" were used interchangeably by Representative Whittington and others. The functional meaning of both terms is the storage in the six Pick-Sloan reservoirs allocated to Bureau functions. Irrigation and reclamation encompass agriculture but extend also to other beneficial consumptive uses.

When the flood control bill reached the Senate, Senator O'Mahoney proposed an amendment to Section 6 (Section 4 in the House) that would have allowed the Secretary of War to dispose of all stored water at Corps-constructed reservoirs, but that restricted the Secretary in a manner analogous to the

restrictions imposed by the reclamation laws. *See* 90 Cong. Rec. 8548 (1944). Other western senators vigorously opposed this amendment, preferring not to involve the Army in irrigation and reclamation functions at all. *See id.* at 8548-49. These senators preferred the language adopted in the House (and ultimately adopted in Section 6 of the Act) by which the Secretary of the Army was authorized to sell surplus water only for "domestic and industrial uses." 90 Cong. Rec. 8546, 8548 (1944). Senator Hayden believed that the House's use of the terms "domestic" and "industrial" and omission of the term "irrigation," effectively prevented reclamation water from coming within the Corps' domain as "surplus water." *Id.* at 8546.

The Eighth Circuit was aware of the Pick-Sloan Plan, *see* 787 F.2d at 275-76, ETSI Pet. App. at 8a-10a, but utterly failed to appreciate its significance. -The court seemed unable to comprehend the concept of shared authority whereby the Bureau could make its reclamation water available for industrial use under the Reclamation Project Act of 1939 at the same time the Corps was selling flood control water for industrial use as "surplus water" under Section 6 of the Flood Control Act of 1944. The court merely restated the district court's simplistic analysis, which concluded that because the Corps built the Oahe dam, Lake Oahe is not a reclamation development and none of its water is subject to the authority of the Bureau.<sup>15</sup> *See* 787 F.2d at 280-81, ETSI Pet. App. at 19a-21a. The court erroneously characterized the question of division of authority

<sup>15</sup> The court of appeals may have believed that it was promoting administrative efficiency by holding that the Corps had sole authority to manage the mainstem Missouri dams. Congress, however, anticipated that the Bureau and the Corps would share authority over the mainstem reservoirs. *See supra*, Section II(A). Congress, the Corps, and the Bureau recognized that individual dams and reservoirs could not be operated in isolation. Management for multi-purpose use required close coordination of operations of each feature and close coordination among agencies and between agencies and state authorities. Thus, flood control and navigation uses for stored water had to be coordinated with irrigation and reclamation uses. *See, e.g., Pick Report*, H.R. Doc. No. 475, *supra*, at 3, 4, 6, 7, 12, 17, 27-29; *Sloan Report*, S. Doc. No. 191, *supra*, at 7, 8, 17, 116, 117.

between the Corps and Bureau as one of fact, reviewable under the clearly erroneous standard. 787 F.2d at 280, ETSI Pet. App. at 19a. Even under that standard, the district court should have been reversed. But the issue is not one of fact; it is the legal question of statutory interpretation. Congress' intent is unmistakable: The Flood Control Act of 1944 adopted the Missouri Basin development plan jointly proposed by the Corps and Bureau; the Corps and Bureau both intended that the Corps would have authority over storage allocated to flood control and navigation and the Bureau would have authority over storage allocated to reclamation and upstream consumptive use. Congress approved and adopted that allocation of authority.

**B. The Debates Show That Congress Intended a Preference for Consumptive Uses Over Navigation Uses and Thus Intended to Confirm the Right, Power and Authority of the Upper Basin States Over Water Stored Within Their Boundaries.**

The Lower Basin States did not bring this lawsuit as disinterested ombudsmen seeking only to assure that the correct federal agency sign water service contracts. From its inception, this lawsuit has been a thinly veiled artifice to block consumptive use by the Upper Basin States of the mainstream water.<sup>16</sup> The Respondents understand only too well that when Congress chooses the agency to develop a river basin it also chooses the legal regime that will apply to water resource development. The Bureau operates in conformity to state law; the Corps follows a separate agenda and can be insensitive to a state's management of its water resources.<sup>17</sup> So far, the Lower

<sup>16</sup> See, e.g., *Missouri v. Andrews*, No. CV-82-L-442, *Complaint for Injunctive and Declaratory Relief*, paragraphs 26, 49, 55 and 75 (D. Neb. filed Aug. 18, 1982).

<sup>17</sup> Senator Overton explained these agencies' separate roles:

For years the Army engineers have worked in the Missouri River Basin in order to determine proper projects for flood control and navigation and

Basin States have accomplished their objective in this lawsuit. The Eighth Circuit's decision upsets the division of authority Congress mandated and thus has upset Congress' plan for the use of stored Missouri River water. The decision must be reversed if Congress' will is to be done.

What Congress realized and the Eighth Circuit did not is that the Bureau of Reclamation promotes and facilitates consumptive use of water in the four Upper Basin Reclamation States and does so in tandem with each State's regime for administering water resources. Congress instructed the Bureau in Section 8 of the Reclamation Act of 1902 to defer to state laws governing control, appropriation, use or distribution of reclamation water, and, except where Congress expressly says otherwise, deference to state law has been the Bureau's obligation since 1902. *See California v. United States*, 438 U.S. 645, 653-54, 675, 678 n. 31 (1978). The members of the House and Senate who debated and approved the Flood Control Act of 1944 were fully informed on the Bureau's expertise in irrigation and reclamation and were acutely aware of its obligation to defer to state law.<sup>18</sup> The representatives of the western states

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for a number of years the expert engineers of the Bureau of Reclamation have been working in order to decide upon proper projects for irrigation and local beneficial uses of water in the States comprising the Missouri Basin.

90 Cong. Rec. 8375 (1944).

<sup>18</sup> *See* 90 Cong. Rec. 4134 (1944) (Rep. Curtis), 4140 (Rep. Burdick), 4141-42 (Rep. Burdick — quoting Judge Stone), 4197 (Reps. Robinson, Rockwell), 4215 (Rep. Dirksen), 4216 (Rep. Sullivan); 90 Cong. Rec. 8245 (1944) (Sen. Overton), 8545 (quoting letter from Secretary Ickes), 8548-49 (Sen. Hatch); *see also* 90 Cong. Rec. 2913 (1944) (Rep. Lemke in debate on rivers and harbors bill). The Bureau appreciated the significance of not disturbing existing water rights under western states' water law. Bureau Commissioner Bashore testified:

The fact that the water is apportioned under States laws in the West is a reason why there is very serious danger in the dedication by the Congress of the waters of the great rivers that arise in the arid zone and flow into the humid zone to the purpose of navigation to the exclusion of future irrigation development upstream.

*Flood Control Hearings, supra*, at 960.



and their allies fought hard in both the House and the Senate to preserve an active role for the Bureau in administration of Missouri River mainstream waters, and they succeeded. The Senate adopted their view in the O'Mahoney-Millikin Amendment, 90 Cong. Rec. 8547, 8553 (1944), and the conference incorporated the Senate language in the final language of the Flood Control Act, 90 Cong. Rec. 9263 (1944). See 58 Stat. 887, 888-89. The identical provisions were incorporated in the companion bill that became the Rivers and Harbors Act of 1945, 59 Stat. 10, 10-11. See 90 Cong. Rec. 8671-73 (1944).

The legislative history demonstrates that Congress intended the O'Mahoney-Millikin Amendment to ensure that preference would be given to consumptive uses of Missouri River mainstem water over navigation uses. See, e.g., 90 Cong. Rec. 8485 (1944) (Sen. O'Mahoney). Congress considered upstream consumptive uses more worthy than downstream navigation uses. See Flood Control Act of 1944, § 1(b), 58 Stat. at 889; see also 90 Cong. Rec. 4130 (1944) (Rep. Curtis: noting importance of irrigation); 4212 (Rep. Lemke: Upper Basin States should have preference to their own waters for domestic use and for irrigation).<sup>19</sup> Representative Lemke of North Dakota passionately contrasted the value of irrigation and navigation: "We are not going to take the water from the people in the States where it originated so that some fellow may float a yacht down the lower Mississippi Valley, while the people and their cattle in the upper regions go hungry on

<sup>19</sup> The preference for consumptive uses over navigation uses is also abundantly clear from the debates on the rivers and harbors bill. See 90 Cong. Rec. 2836 (1944) (Rep. Barrett), 2838 (Rep. O'Connor), 2839 (Rep. Lemke), 2843 (Rep. Mundt), 2844 (Rep. Dirksen), 2857 (Rep. Robinson), 2911 (Rep. White). Advocates of irrigation use noted how little the Missouri was used for navigation to and from the Upper Basin States. *Id.* at 2913 ("As far as being an avenue for transportation for the upper States it never did exist to any great extent and to what little extent it was used has been so long ago that it no longer remains in the memory of the present generation."). Congress did not have reliable figures on future stream flows under the Pick-Sloan Plan, so it had to establish priorities in the event of a conflict between uses. See M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, at 163 (Univ. of Illinois Press, 1955).



account of the lack of food and water." 90 Cong. Rec. 4213 (1944).

Giving the Bureau authority over storage allocated to irrigation and reclamation was an integral part of the mechanism for preferring consumptive uses to navigation uses and for confirming state control over its water. Representative Curtis explained why the flood control bill vested significant authority in the Bureau:

I believe that the Bureau of Reclamation, being a western agency, being committed to the doctrine of consumptive and beneficial use of water, and in view of its past record covering protection of State rights and the protection of the water rights of the individual, will exercise its authority judicially [sic] and that that is the very best we can do.

90 Cong. Rec. 4134 (1944). The division of authority between the Bureau and the Corps was not the goal in itself, but merely a means to an end — preserving priority for consumptive uses of stored water and guaranteeing to the states their traditional role in the use and allocation of such stored water. *See, e.g.*, 90 Cong. Rec. 4123 (1944) (Rep. Whittington: Committee on Flood Control did not include any provision that would retard reclamation because of concern expressed about the rights of states to the uses of water); 4134 (Rep. Curtis: noting that regulation of reservoir storage space for irrigation water will be turned over to Bureau of Reclamation, which "can be trusted to recognize both State rights and the individual rights of the owners of the water."); 4140 (Rep. Burdick: noting concern with Corps' control over water — "The Reclamation Bureau has worked with the States; they have worked with North Dakota and other States; and the use of water is regulated by the States."); 4197 (Rep. Robinson: requiring that federal government comply with federal reclamation laws would resolve western states' fears that they will lose jurisdiction over waters arising in their states).

This Court cannot rule on the question of division of authority between the Corps and Bureau without taking into account the goals that shaped the division of authority; the evidence is overwhelming that Congress intended to give priority to consumptive uses and defer to state water law. It is therefore anomalous that the Eighth Circuit believed it could not take into account the competing interests of the Upper Basin and Lower Basin States in construing the Flood Control Act's "delicate balance of authority" between the Bureau and the Corps. See 787 F.2d at 286, ETSI Pet. App. at 32a. In attempting to avoid the sensitive issues that divided the states of the Missouri Basin, ostensibly because it had to "defer to legislative prerogative," the court of appeals ignored the most probative evidence in the Flood Control Act's legislative history. *Id.* The Eighth Circuit did not have to resolve the dispute between the Upper Basin and Lower Basin States; Congress had already resolved the issue, and the court merely had to take note of Congress' resolution of it, made manifest in its division of authority between the Corps and Bureau and its preference for upstream consumptive uses over downstream navigation uses.

The theme of preserving the Upper Basin States' rights to control a portion of the stored waters within their territorial boundaries permeates the congressional debates on the Act.<sup>20</sup>

<sup>20</sup> See, e.g., 90 Cong. Rec. 4119 (1944) (Rep. Mundt: noting need to protect irrigation interests in upper portions of Missouri Valley); 4139 (Rep. Clason: expressing concern that new federal flood control legislation not usurp states' rights to control water within their boundaries); 4141 (Rep. Burdick: expressing fear that arid and semi-arid western states will be divested of title to their own water); 4197 (Rep. Rockwell: in the early days, people in western states fought for right to use water to grow crops and resolved issues through cooperation with Department of Interior); 4212 (Rep. Lemke: protection of irrigation in the Upper Missouri River Basin "is a State-right matter."); 4214 (Rep. Mansfield: water is the lifeblood of the western states; Rep. Cochran: controversy prevailing between flood control and irrigation is actually controversy between Upper Basin States and Lower Basin States); 4216 (Rep. Sullivan: arid-land states seek protection of irrigation and reclamation based on rights and customs enjoyed under riparian and

The representatives of the Upper Basin, led by Senator O'Mahoney (of Wyoming), were concerned that Congress would inadvertently disrupt traditional water rights law and establish new rights to navigation water under its Commerce Clause powers when it passed legislation intended to address the menace of floods on the Missouri that also provided for huge volumes of storage capacity at the same time. For example, Senator Wheeler of Montana stated:

While it is true that it is a flood-control bill, we must bear in mind that its provisions reach much further than do the provisions of a mere flood-control bill, because in the pending bill an effort is made to lay down a policy not only as to flood control but with respect to the development of power, the sale of power, irrigation, and reclamation.

90 Cong. Rec. 8252 (1944). The immediate impetus of H.R. 4485, which became the Flood Control Act of 1944, was precisely that: flood control. A series of three devastating floods had caused widespread damage in the lower Missouri Valley, and Congress was primed to address the problem. See H.R. Rep. No. 1309, 78th Cong., 2d Sess., *reprinted in* 1944 U.S. Code Cong. Serv. at 1349-51; see generally M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 3-5 (Univ. of Illinois Press, 1955). Congress was, however, simultaneously considering legislation to enlarge the channel in the lower portion of

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appropriation doctrines); 90 Cong. Rec. 8227 (1944) (Sen. Murray [prior to addition of O'Mahoney-Millikin language]: flood control bill does not adequately protect rights of Upper Basin States); 8374 (Sen. Murray: flood control bill has been fought because "it totally ignores the irrigation rights of the States in the upper part of the valley"), 8485 (Sen. O'Mahoney: Pick-Sloan Plan was a "redeclaration of the historic doctrine of priority of the consumptive uses of water in the [arid-land] States"); see also *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Sen. Comm. on Commerce*, 78th Cong., 2d Sess. 544 (1944) (Gov. Ford [of Montana]: "we are not satisfied with just having the dams; we want the right to the use of the waters behind those dams").

The theme of preserving states' rights also appeared in the debates on the rivers and harbors bill, especially in the house debates that occurred prior to acceptance of the O'Mahoney-Millikin Amendment by the Senate. See 90 Cong. Rec. 2835 (1944) (Rep. Barrett), 2840 (Rep. Case), 2841 (Rep. Burdick), 2857 (Rep. Robinson), 2912 (1944) (Rep. Hill).

the Missouri River mainstem (below Sioux City, Iowa) to promote navigation. See H.R. 3961, 78th Cong., 2d Sess. (1944) (eventually enacted as the Rivers and Harbors Act of 1945, 59 Stat. 10). This proposal for a channel nine-feet deep to replace the six-foot channel gave the Upper Basin States grave concern because a deeper channel would require larger volumes of water to keep it full, possibly to the detriment of upstream consumptive uses. The Upper Basin States feared that congressional action establishing such a navigation channel would vest water rights in the Lower Basin States where the navigation channel was located and would thus preclude future consumptive uses.<sup>21</sup>

The Upper Basin States mobilized their forces first in the House and then in the Senate. The constant refrain from the Lower Basin States and their allies was that the flood control legislation (H.R. 4485) and rivers and harbors legislation (H.R. 3961) were not intended to create any water rights or to deprive the Upper Basin States of their traditional hegemony over their water. Senator Clark of Missouri argued:

[T]he bill originally started as a strictly flood-control measure, and . . . the whole question of irrigation and reclamation was injected into the measure entirely improperly and irrelevantly, in my opinion, by an amendment introduced by the Senator from Wyoming [Mr. O'Mahoney], joined in by numerous Senators from other irrigation States.

. . . .

[I]t is unfair . . . to say at this time that the bill is not a strictly flood-control bill . . . .

<sup>21</sup> See, e.g., *Flood Control Hearings*, *supra*, at 1021-22, 1031, 1218, 1222; *Rivers and Harbors Hearings*, *supra*, at 9. The Missouri Valley Regional Planning Commission had noted in a 1942 study that there was a strong likelihood of a clash between consumptive uses and navigation and that principles of priority should be established. See M. Ridgeway, *The Missouri Basin's Pick-Sloan Plan*, 44-45, 67 (Univ. of Illinois Press, 1955). The representatives of the Upper Basin States saw the Pick Report as a threat to continued development of western and Great Plains irrigation. *Id.* at 75.

[T]hose who were interested in navigation and those who were interested in flood control were not responsible for injecting extraneous issues into [the flood-control bill and rivers and harbors bill].

90 Cong. Rec. 8253 (1944).<sup>22</sup>

The Upper Basin States were not convinced by such easy assurances and demanded the guarantees enacted in the O'Mahoney-Millikin Amendment, reflected in Section 1 of the Flood Control Act of 1944, 58 Stat. at 888-89, and in Section 1 of the Rivers and Harbors Act of 1945, 59 Stat. at 10-11. No observer of the congressional debates could have missed the implications of this victory: Congress had created a priority for consumptive uses of Missouri River mainstem water over navigation uses and had confirmed the Upper Basin States' rights to control a significant portion of the stored mainstem waters. By threatening to place the entire Missouri mainstem storage capacity under the effective authority of the Corps, the Eighth Circuit's ruling is antithetical to Congress' goals as reflected in the provisions of the Act, particularly the O'Mahoney-Millikin Amendment. This Court should correct the Eighth Circuit's gross misconstruction of the Act in order to assure that the vast water resources of the Missouri River Basin will be administered in accordance with Congress' intent, in a manner that preserves the right of all states in the basin to a portion of the benefits from the Missouri.

<sup>22</sup> At the hearings on the flood control bill, Colonel Reber repeatedly denied that the Corps' Pick Report would establish any priorities for use of Missouri River water. See *Flood Control Hearings, supra*, at 669, 722, 1061, 1065, 1076. For other examples of the Lower Basin States' denial that the flood control bill and rivers and harbors bill did not affect upstream consumptive uses, see 90 Cong. Rec. 2836 (1944) (Rep. Carter), 2837 (Rep. O'Connor), 2842 (Rep. Bell), 2920 (1944) (Rep. Hoeven), 4123 (Rep. Whittington: no provision in H.R. 4485 "would in any way retard reclamation."), 4124 (Rep. Whittington: "There is no real conflict between navigation, flood control, and irrigation"), 4131 (Rep. Curtis: "The approval of the Pick plan does not add or detract from the navigation issue."), 4142 (Rep. Curtis: allocation of water for navigation is not at issue in flood control bill), 4199 (1944) (Rep. Whittington: flood control bill does not embrace any navigation project); 90 Cong. Rec. 8251 (1944) (Sen. Clark: "[T]his is a flood-control bill, not a navigation bill, not a river and harbor bill, not a power bill.").



## CONCLUSION

Both the district court and the Eighth Circuit adopted the basic position, variously stated, of the Lower Basin States that until and unless water is actually diverted from Lake Oahe (and the other mainstem reservoirs) and applied to the land to raise crops, the reclamation laws and state law have no application to the waters of the Missouri River stored in the Upper Basin States, and accordingly the Secretary of Interior has no authority over that water. *See, e.g.*, 787 F.2d at 280; 586 F. Supp. at 1273-74.

This is a most convenient argument for the Respondent States in current times, when federally financed irrigation projects are out of favor. By succeeding in the lower courts with the argument, the Lower Basin States obtained from the judiciary what was denied them by Congress — dedication of the river to Lower Basin navigation interests. No doubt Senators O'Mahoney, Millikin and others from the West anticipated federal funding of irrigation projects in the Missouri Basin in due course. But it is impossible to believe that western senators, who insisted on the O'Mahoney-Millikin Amendment and who were aware of the time it takes for arid, Upper Basin areas to develop, agreed that state permits and Bureau water supply contracts for non-agricultural use are void. The proponents of O'Mahoney-Millikin were writing a charter for the Missouri Basin, to endure until Congress — not the courts — changed it. Thus the preamble to the Act and O'Mahoney-Millikin reaffirmed state right, power and authority over the water resource, subordinated downstream navigation use to Upper Basin beneficial consumptive use and implemented those decisions by limiting federal power and Corps authority to navigation and flood control purposes and by imposing the Reclamation Act of 1902 and Section 8 thereof on the operation of the dam for other purposes.



WHEREFORE, the Upper Missouri River Basin States of Montana, North Dakota, South Dakota and Wyoming respectfully request that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit and declare that in accordance with Sections 1(a), 1(b), and 9(c) of the Flood Control Act of 1944, Section 9(c) of the Reclamation Project Act of 1939 and the Reclamation Act of 1902, and especially Section 8 thereof, the Water Service Contract between ETSI and the Bureau of Reclamation, made pursuant to the permit granted by the South Dakota Water Management Board, is valid and enforceable.

Dated: May 1987

Respectfully submitted,

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